WULFSBERG REESE COLVIG & FIRSTMAN
PROFESSIONAL CORPORATION
H. James Wulfsberg - 046192
Mark A. Stump - 104942
Richard E. Elder - 205389
Kaiser Center
300 Lakeside Drive, 24th Floor
Oakland, CA 94612-3524
Telephone: (510) 835-9100
Facsimile: (510) 451-2170

Attorneys for Defendant
BLACK & VEATCH CORPORATION

LAW OFFICES
WULFSBERG REESE COLVIG & FIRSTMAN
PROFESSIONAL CORPORATION
KAISER CENTER
300 LAKESIDE DRIVE, 24TH FLOOR
OAKLAND, CALIFORNIA 94612-3524
TELEPHONE (510) 835-9100

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAIGUT S.A. de C.V., a Mexican corporation; and SAIPEM S.A., a French corporation,

Plaintiffs,

v.

SEMPRA ENERGY, a California corporation; SEMPRA LNG, a Delaware corporation; ENERGIA COSTA AZUL, S. de R.L. de C.V., a Mexican corporation; BVT LNG COSTA AZUL, S. de R.L. de C.V., a Mexican corporation; COSTA AZUL BMVT, S.A. de C.V., a Mexican corporation; BLACK & VEATCH CORPORATION , a Delaware corporation; TECHINT S.A. de C.V., a Mexican corporation; THE KLEINFELDER GROUP, INC., a California corporation; ARUP NORTH AMERICA LIMITED, a United Kingdom corporation; ARUP TEXAS, INC., a Texas corporation; WHESSOE OIL & GAS LIMITED, a United Kingdom corporation; Q & S ENGINEERING, INC., a California corporation; and DOES 1 through 20, inclusive

Defendants.

No. 08 CV 0478 JM BLM

DEFENDANT BLACK & VEATCH CORPORATION'S RESPONSE TO THE COURT'S APRIL 9, 2008 ORDER TO SHOW CAUSE

I. INTRODUCTION

Black & Veatch Corporation ("BVC") submits this Memorandum in response to Court's Order to Show Cause Dated April 9, 2008. BVC requests that the Court dismiss this case for lack of subject matter jurisdiction for at least three reasons:

1. Plaintiffs have made no effort to comply with the Court's OSC or carry their burden of establishing diversity in any way.
2. Not even plaintiffs' misguided alter ego theory can explain away Whessoe's lack of diversity.
3. While alter ego allegations might be capable of destroying diversity, they cannot create it.

II. PROCEDURAL POSTURE

The Court's April 9, 2008 Order to Show Cause required the Plaintiffs to show cause why this case should not be dismissed for lack of diversity jurisdiction. Plaintiffs' deadline for submitting responsive briefing was April 23, 2008. On the afternoon of April 22, 2008, Plaintiffs' counsel informed defendant BVC that SaiGut and Saipem planned to dismiss this Federal action without prejudice, and to refile the action in California state court. (Decl. of Mark A. Stump, ¶ 3.) On April 23, in lieu of filing a response to the Order to Show Cause, Plaintiffs filed a "Stipulation for Dismissal Without Prejudice" which, however, was not signed by all parties who had appeared in the case. (Stump Decl., ¶ 4.) The next day, the Court's staff recharacterized the "Stipulation" as a "Joint Motion for Dismissal Without Prejudice". Since then, Plaintiffs have taken no further action to have the case dismissed, so far as is known to this defendant, Black & Veatch Corporation. (Stump Decl., ¶ 4.)

On April 29, 2008, Plaintiffs refiled this case in San Diego County Superior Court (Case No. 37-2008-82862-CU-CD-CTL), and it is Black & Veatch Corporation's understanding that all parties who had been served with Plaintiffs' Federal case consented to service of San Diego County action (Stump Decl., ¶ 5, Ex. 1). Nonetheless, because this Federal case has not been dismissed, and the deadline for Defendants' response to the Order to Show Cause has come, defendant Black & Veatch Corporation submits this responsive brief in compliance with the Court's order.

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III. ARGUMENT

A. Plaintiff has the burden of establishing diversity and has failed to do so.

The citizenship of the parties is a jurisdictional fact in diversity actions. The burden is on the plaintiff – the party invoking federal jurisdiction – to plead and prove such facts. *McNutt v. General Motors Acceptance Corp.* 298 U.S. 178 (1936); *Kanter v. Warner-Lambert Co.*, 265 F.3d 853, 857-858 (9th Cir. 2001) ["the party asserting diversity jurisdiction bears the burden of proof"] Plaintiffs' failure to respond to the Court's April 9, 2008 Order to Show Cause which ordered plaintiffs to demonstrate that diversity exists is therefore sufficient grounds to dismiss the action.

B. The presence of even one defendant with foreign citizenship destroys diversity and plaintiffs concede that Whessoe is diverse.

Under 28 USC §1332, diversity exists only where all plaintiffs are diverse from all defendants. Section 1332(a) states "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . (2) citizens of a State and citizens or subjects of a foreign state;"

The Ninth Circuit has unequivocally held that this means that, in a case involving foreign plaintiffs, the presence of even one foreign defendant destroys diversity. *Faysound Limited v. United Coconut Chemicals, Inc.*, 878 F.2d 290 (9th Cir. 1989) ["Where an alien is made co-defendant with a citizen-defendant by an alien plaintiff . . . there is no jurisdiction over the alien. If the alien defendant is indispensable . . . there is no jurisdiction at all."] Plaintiffs, both foreign corporations, allege that "Defendant Whessoe Oil & Gas Limited ("Whessoe") is a corporation formed under United Kingdom law, with offices at Princes Gate, London, U.K." (Complaint at ¶12.) Plaintiffs do not even attempt to allege any theory under which any other party's citizenship should be attributable to Whessoe. Whessoe's presence alone therefore destroys diversity.

C. Federal law rejects the theory that a plaintiff may use the alter ego doctrine to ignore a defendant's place of incorporation and thus preserve diversity.

Plaintiffs have indicated that they intend to rely on alter ego allegations to establish diversity jurisdiction. However, even if plaintiffs were somehow successful in persuading the

Court that BVT is the alter ego of Black & Veatch Corporation (which it is not), such a finding might compel the conclusion that the combined entity would be a citizen of ***both*** BVT's place of incorporation (Mexico) ***and*** Black & Veatch's place of incorporation (Delaware) and perhaps one or more other "principal place of business" jurisdictions as well, thus destroying diversity on other independent grounds. But, the Code, federal caselaw and leading commentators all unequivocally demonstrate that an alter ego finding would ***not*** support a ruling that BVT or the alleged combined entity is ***only*** a citizen of Delaware.

The five federal circuits to deal with the issue presented here have all held that alter ego allegations can create additional places of citizenship (and thus narrow diversity jurisdiction) but can never "erase" places of citizenship to expand diversity jurisdiction.

- **Eleventh Circuit:** *Fritz v. American Home Shield Corp.*, 751 F.2d 1152, 1153 (11th Cir. 1985) ["On appeal, Fritz argues that the state of incorporation should not control because the Florida corporation was the alter ego of its non-Florida citizen parent corporation, defendant . . . whose California citizenship should be imputed to it. This novel argument has no merit under the clear statutory language and well-settled caselaw."]
- **Fifth Circuit:** *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 412-13 (5th Cir. 1987) ["The alter ego doctrine may not be used to create diversity jurisdiction by ignoring the principal place of business of a subsidiary corporation and imputing to it the principal place of business of the parent."]; *See also Panalpina Welttransport GmBh v. Geosource, Inc.*, 764 F.2d 352, 354 (5th Cir. 1985).
- **Third Circuit**: *Lang v. Colonial Pipeline Co.*, 383 F.2d 986 (3rd Cir. 1967) [affirming the District Court's ruling (266 F.Supp. 552, 557) that "plaintiffs have cited no cases to us and our research has disclosed none where the courts have overlooked the separate identity of a wholly owned subsidiary in order to avoid being ousted of its diversity jurisdiction . . . ."]
- **Tenth Circuit:** *Glenny v. American Metal Climax, Inc.*, 494 F.2d 651, 655 (10th Cir. 1974) ["The trial judge therefore concluded that he was not compelled to retain jurisdiction in a case where diversity is satisfied only by piercing the corporate veil. We agree with this reasoning."]

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- **D.C. Circuit:** *Pyramid Sec. Ltd. v. IB Resolution, Inc.*, 924 F.2d 1114, 1120 (D.C. Cir. 1991). ["The [district] court argued that imputing a subsidiary's citizenship to its parent is proper where the latter is the 'alter ego' of the former . . . We reject this analysis."]

(1) *Pyramid* strongly suggests that the Ninth Circuit would not permit alter ego allegations to expand diversity.

While the Ninth Circuit has not been presented with an attempt to use a parent's citizenship to create diversity jurisdiction over an alleged alter ego subsidiary, it based its analysis of its the – admittedly distinguishable – facts in *Danjaq v. Pathe Communications Corp.*, 979 F.2d 772 (9th Cir. 1992) on *Pyramid* and concluded that the Central District's dismissal for lack of diversity was proper. In *Danjaq* the court noted the dearth of Ninth Circuit authority, saying "In the only recent case of which we are aware involving a parent's citizenship, [*Pyramid*] the D.C. Circuit refused to consider a subsidiary's activities." The Ninth Circuit went on to explain with approval the holding of *Pyramid*, saying "a parent does not take its subsidiary's citizenship for jurisdictional purposes even where the parent is the alter ego of its subsidiary and is being sued for acts of the subsidiary." *Danjaq*, 979 F.2d at 775.

(2) District Courts have condemned plaintiffs' theory as "moribund" and held that "the case law supports the exact opposite view"

Several district courts agree that alter ego allegations can never create diversity. In *Maday v. Toll Brothers, Inc.*, 72 F.Supp.2d 599, 606-607 (E.D. Va. 1999), the court described plaintiffs' theory as "moribund" to the extent it "ever had any life." *Needham v. Wedtech (USA), Inc.*, 918 F.Supp. 353, 357 (N.D.Ok. 1996) held " Plaintiffs have not cited any cases in which the 'alter ego' exception has been used to create subject matter jurisdiction in a diversity case by imputing the parent's principal place of business to the subsidiary. Indeed, the case law supports the exact opposite view." *See Grunblatt v. UnumProvident Corp.*, 270 F.Supp.2d 347, 352 (E.D.N.Y. 2003); *Beightol v. Capitol Bankers Life Ins. Co.*, 730 F.Supp. 190, 193 (E.D.Wis.1990); *Bejcek v. Allied Life Financial Corp.*, 131 F.Supp.2d 1109, 1112 (S.D. Iowa 2001); *Polanco v. H.B. Fuller Co.*, 941 F.Supp. 1512, 1517 (D.Minn. 1996); *Mouawad Nat. Co. v. Lazare Kaplan Intern. Inc.*, 476 F.Supp.2d 414, 426 (S.D.N.Y. 2007).

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(3) Leading commentators agree that alter ego allegations can only destroy, never create, diversity jurisdiction.

Moore's Federal Practice cites many of the authorities discussed above in reaching the conclusion that alter ego allegations can never create diversity. Professor Moore states:

> The attribution of the parent's citizenship to the subsidiary may expand, rather than supplant, the citizenship of the subsidiary . . . The alter ego doctrine cannot be used to preserve diversity jurisdiction by ignoring the place of incorporation of the subsidiary and treating the subsidiary as if it were a citizen of the state of incorporation of the parent corporation.

15 Moore's Federal Practice § 102.56 [7][a] (3d ed. 2008).

IV. CONCLUSION

Given plaintiffs' failure to even attempt to carry their burden of establishing jurisdiction, the presence of at least one party who plaintiffs admit is not diverse and the substantial body of law rejecting the theory that alter ego allegations can create diversity, Black & Veatch Corporation submits that the Court should dismiss this matter for lack of subject matter jurisdiction.

DATED: May 2, 2008

WULFSBERG REESE COLVIG & FIRSTMAN
PROFESSIONAL CORPORATION

By /s/ Richard E. Elder
RICHARD E. ELDER
Attorneys For Defendant
BLACK & VEATCH CORPORATION